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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 403

PAUL S. SAGERS, ET AL., *Petitioners,*

v.

LLOYD BRIGGS, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court Appeals for the Tenth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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August 14, 1970

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The respondents oppose the petition for writ of certiorari on two grounds:

1. The Untimely Filing of the Petition Deprives This Court of Jurisdiction Over the Case.

The petition for writ of certiorari is plainly out of time. The judgment of the Tenth Circuit was entered on April 7, 1970, simultaneously with its opinion. No rehearing was sought or denied. Thus, pursuant to the command of 28 U.S.C. § 2101(c), the writ of certiorari had to be sought "within ninety days after the entry of such judgment or decree"—in other words, by no later than July 6, 1970. And no extension of

that filing deadline was sought or obtained from a Justice of this Court.

The petition was actually filed in this Court on July 15, 1970, nine days after the expiration of the deadline. Where, as here, the time for filing a petition is established by an Act of Congress rather than a Rule of this Court, such an untimely filing has consistently been held to be a jurisdictional defect, making it impossible for the Court to waive the untimeliness or to entertain the petition. As stated in *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942), such a petition "must . . . be denied for want of jurisdiction." See also, *Teague* v. *Commissioner of Customs*, 394 U.S. 977 (1969); cf. *Schacht* v. *United States*, 398 U.S. 58, 63-65 (1970), where only last Term this Court emphasized that a waiver of untimeliness can be made only where a Rule of this Court, rather than a statute, establishes the time requirement.[1]

2. The Decision Is Obviously Correct and Involves No Conflict of Opinion or Other Basis for Review by this Court.

Even apart from the untimeliness of the petition, no reason is apparent for review of the decision below. While this Court in *Maryland* v. *Wirtz*, 392 U.S. 183, 200 (1968), did reserve questions of state immunity "for appropriate future cases," it did not thereby imply that all questions of state immunity stemming from suits under the Fair Labor Standards Act would necessarily qualify for review by this Court.[2] Some

[1] Even if a waiver were permissible, no excuse or extenuating circumstance has been advanced by petitioners to justify a waiver.

[2] The Court's reference to "numerous complex issues that might arise in connection with the Act's various remedial provisions" obviously relates to issues more complex than here involved.

of those questions might be correctly resolved by a lower court so as to make this Court's expenditure of time to review the matter totally unnecessary. Such is this case.

The correctness of the decision below is largely self-evident from the Tenth Circuit's opinion. The decision rests squarely upon a proper application of the principle enunciated by this Court in *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964), that when Congress in fact exercises its power over States under the Commerce Clause the States cannot interpose their sovereign power in the form of immunity from suit where such suit is necessary and appropriate to implement the Congressional regulation.

The petitioners would seek to avoid *Parden* on two grounds: (1) the existence of a so-called proprietary activity in *Parden*, as distinguished from a so-called governmental activity in this case, and (2) the commencement of the state activity in *Parden* some 20 years after the Congressional statute was enacted, as contrasted with Utah's involvement in the activities here at stake long before the 1966 amendments to the Fair Labor Standards Act. Neither distinction is meritorious or decisive.

The decision of this Court in *Maryland* v. *Wirtz*, *supra*, 195, disposed of the first suggested distinction by ruling that when the Federal Government acts within its delegated power it "may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character." As to the second suggested distinction, the court below recognized that it would be an intolerable proposition to maintain that Congress is constitutionally inhibited

from insisting upon a waiver of state sovereign immunity as to state operations already in effect at the time of enacting constitutionally permissible controls over those operations. If Congress has the power under the Commerce Clause to subordinate that immunity in the interests of making effective the supreme federal enactment, then the Commerce Clause admits of no distinction as to the time when the federal control is adopted. The Commerce Clause, in short, "acknowledges no limitations other than are prescribed in the constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196 (1824).

The critical factor in this case, as the Tenth Circuit recognized, is that "when Utah continued its operation of the institution, knowing of the passage of the 1966 Amendments, it waived its immunities to the remedies provided in the Act." Pet. App. xii. At the point when Congressional controls are imposed, the State "must decide *eo instante* whether to continue or withdraw," Pet. App. xii, with respect to the regulated activities. Having determined to continue those activities in this instance, Utah cannot now claim immunity from suit. Such is the inescapable logic of the *Parden* ruling.

It need only be added that this Court was unanimous in *Parden* as to the controlling constitutional principles, so accurately applied here by the Tenth Circuit. What divided this Court in *Parden* was an evaluation of whether Congress, in the Federal Employers' Liability Act, meant to effect an automatic and compulsory waiver of immunity. No such issue is here present as to the 1966 amendments to the Fair Labor Standards Act. *Maryland* v. *Wirtz* makes it clear that Congress did intend to impose its full Com-

merce Clause power over state activities, thus necessarily effecting a waiver of immunity wherever necessary to effectuate the Congressional program.

There is no conflict alleged as to the foregoing propositions, thus implementing the appropriateness of the denial of certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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